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No. 80-2134

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY AND SHIRLEY ELISER,

Petitioners,

versus

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON AND JUNE G. ALLEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether the admiralty jurisdiction of the Federal Court should be extended to accidents occurring between purely recreational boats in which there is absolutely no commercial or traditional maritime activity involved.

LIST OF PARTIES PURSUANT TO RULE 28.1

1. Petitioners: Foremost Insurance Company[1] and Shirley Eliser. (Defendants-Appellees, below)

2. Respondents: Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson. (Plaintiffs-Appellants, below)

3. Respondent: June G. Allen. (Defendant-Appellee, below)

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1. Foremost Insurance Co. is a wholly owned subsidiary of Foremost Corporation of America. Foremost Corporation of America also owns Tuloka Affiliates, Inc., Foremost Home Service Corporation and Access Control Systems, Ltd. Foremost Insurance Co. owns in whole or in part Foremost Guaranty Corporation, Foremost Life Insurance Company, Foremost Financial Services Corporation, Foremost Home Brokers, Inc., Centennial Park Hotel Corporation and Foremost Affiliated Insurance Services, Inc. It is affiliated with Foremost County Mutual Insurance Company and has an indirect financial interest in Minnehoma Insurance Company and M.A.G. Agency, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Richardson v. Foremost Ins. Co.*, 641 F.2d 314 (5th Cir. 1981). It is set out in the Joint Appendix at page 33. The per curiums denying the application for rehearing and applications for rehearing en banc are reported at 646 F.2d 566 (5th Cir. 1981) and are set out at pages 42 and 43 of the Joint Appendix. The opinion of the District Court can be found at 470 F.Supp. 699 (M.D. La. 1979) and has been set forth at pages 19 through 29 of the Joint Appendix.

JURISDICTION

This Court has accepted jurisdiction pursuant to 28 U.S.C. 1254(1). The Honorable Fifth Circuit Court of Appeals entered judgment on April 2, 1981. (Joint Appendix, page 39) Motions for rehearing and rehearing en banc were timely filed on April 15, 1981 (Joint Appendix, page 4) and denied by the Court of Appeals on May 4, 1981 (Joint Appendix, page 4). The petition for certiorari was filed on June 15, 1981 and granted by this Honorable Court on October 5, 1981.

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

Article III, Section 2 of the United States Constitution is set out in full at page 22 of the jurisdictional appendix and reads in pertinent part as follows:

> Section 2. The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority; to all cases affecting ambassadors, or public

ministers and consuls, to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a State and Citizen of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states and between a state, or the citizens thereof, and foreign states, citizens or subjects.

II.

28 U.S.C. 1254 is set out verbatim in the jurisdictional appendix at page 23 et seq.

III.

28 U.S.C. 1333 is set out in full at pages 23 and 24 et seq. of the jurisdictional appendix.

IV.

33 U.S.C. 154 is set out in full at page 24 et seq. of the jurisdictional appendix.

V.

24 U.S.C. 740 is set out in full at pages 24 and 25 of the jurisdictional appendix.

VI.

L.S.A. R.S. 22:658 is set out in full at page 25 of the jurisdictional appendix.

STATEMENT OF THE CASE

The complaint asserts that on April 25, 1976, Clyde Richardson was killed in a boating accident which occurred on the Amite River some ½ to ¾ of a mile south of the French Settlement Bridge near that village in Louisiana. (J.A. 5) Suit was commenced on September 15, 1976 on behalf of decedent's wife and major children against June Allen, allegedly the operator of the boat in which decedent was a passenger, and Shirley Eliser, the driver of the boat which collided with the boat supposedly operated by June Allen, and Foremost Insurance Company and Shirley Eliser, pursuant to L.S.A. R.S. 22:658(2), Louisiana "Direct Action Statute." (Jurisdictional Appendix, page 25)

June Allen answered the complaint admitting the death and location of the occurrence, but denying all else. Combined with her answer, Mrs. Allen brought a counter claim against the original complaints and a cross-claim against Ms. Eliser and Foremost Insurance Company asserting that she was in fact a passenger in the boat operated by Clyde Richardson and that she received certain injuries in the collision as a result of the combined negligence of Clyde Richardson and Shirley Eliser. (J.A. 8)

After extensive discovery, Shirley Eliser and Foremost Insurance Company answered admitting the death, but denying the other allegations of the complaint. Your Petitioners further asserted affirmatively that the sole cause of the collision was the negligent operation of the boat being driven by either June Allen or Clyde Richardson as a result of lack of skill and/or intoxication by both occupants. (J.A. 13) Your Petitioners further asserted affirmatively the Federal Court's lack of subject matter jurisdiction in the premises in that the facts did not present a case of admiralty

or maritime jurisdiction and that further diversity was missing. (J.A. 14)

June Allen had attempted to amend her counter-claim and cross-claim to assert diversity as an additional jurisdictional ground, (R. 52) but her motion to amend was denied on August 11, 1977, since she was a Louisiana resident at the time of the occurrence. After Mrs. Allen's suit of mandamus to the United States Court of Appeals, Fifth Circuit was denied (R. 70), she dismissed her cross-claim against Shirley Eliser and Foremost Insurance Company without prejudice (J.A. 16) and filed a new action in State District Court.

At a status conference held before the United States Magistrate, Frank J. Polozola, on March 14, 1978, the Court on its own motion addressed the issue of subject matter jurisdiction and ordered briefs supported by affidavits or depositions filed. (J.A. 17) All parties submitted such memoranda supported by all depositions taken, as well as various documentary evidence from the U.S. Corps of Engineers and the Louisiana Department of Transportation and Development as to the navigability of the Amite River at the site of the collision and its use as a commercial artery. (R. 81-83, 90-119, 136-139) By minute entry dated August 11, 1978, Magistrate Polozola found that, based upon the evidence then before the Court, the Court had admiralty jurisdiction but reserved the Court's right to re-examine the jurisdictional question. (J.A. 18)

Pre-trial conference was held before the Honorable E. Gordon West, Judge, United States District Court, Middle District of Louisiana on December 5, 1978. (R-125) Again, the Court on its own motion reconsidered the jurisdictional questions and supplemental briefs on the issue were submitted. The Court found, for written reasons assigned dated

May 23, 1979, that admiralty jurisdiction was in fact lacking and dismissed the complaint of the Richardson heirs. (J.A. 19)

The District Court found these facts to be undisputed:

"(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident, the boat was actually pulling a skier on a zip sled;

(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in a 'commercial maritime activity' before the accident;

(4) At the time of the accident neither boat was involved in any 'commercial maritime activity' of any sort;

(5) Neither of the two drivers of the boats were being paid to operate the boat, nor was this activity in any way a part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of 'traditional maritime activity', either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any 'commercial activity,' even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as 'purely pleasure craft', not in any way 'involved in commerce'; and,

(9) There is no other instrumentality involved in

> this accident that had even a minor relationship to 'admiralty' or 'commerce'; i.e. a buoy, barge, oil drilling apparatus, etc." (J.A. 20 and 21)

The District Court relied upon three cases which controlled its decision — *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Kelly v. Smith*, 485 F.2d 620 (5th Cir. 1973) and *Peytavin v. Government Employees Insurance Co.*, 453 F.2d 1121 (5th Cir. 1972). The District Court interpreted these decisions to require more than a maritime locus to support the Federal Court's maritime jurisdiction, that "plus" being that the complained of occurrence have some "commercial" or "traditional maritime" connection. (J.A. 28) Finding no such connection in the instant controversy, the District Court dismissed the complaint for want of subject matter jurisdiction on May 23, 1979. (J.A. 30)

The Richardson heirs filed notice of appeal and posted bond on June 19, 1979. (J.A. 31) June Allen filed her notice of appeal on June 21, 1979 and posted bond on June 21, 1979. (J.A. 32)

The United States Court of Appeal, Fifth Circuit, for written reasons dated April 2, 1981, reversed and remanded. (J.A. 33) Although that Court agreed with the District Judge's formulation of the rule to support subject matter jurisdiction, it disagreed with the application of the rule to the facts presented. That Court abandoned any requirement that the complained of activity have any connection to commerce and did not imply any commercial requirement in defining "traditional maritime activity" and held:

> "We hold that two boats, regardless of their intended use, purpose, size, and activity, are engaged in traditional maritime activity when a collision between them occurs on navigable waters." (J.A. 35)

Your Petitioners filed motions for rehearing and rehearing en banc on April 15, 1981 (J.A. 4) which were denied on May 4, 1981 (J.A. 41 and 43).

Petition for Certiorari was filed with this Court on June 15, 1981 and was granted on October 5, 1981. (J.A. 45).

In reversing the District Court, the Court of Appeals was ". . . strongly influenced by the holding in *Kelly v. Smith*, supra, in which (the Fifth Circuit) stated that '(a)dmiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters'." (J.A. 36) It based its opinion on the fact that the "Rules of the Road" apply to all boats, regardless of size and usage, traversing navigable waters. (J.A. 35) We submit that this Court has mandated some "commercial" connection to the location of the wrong in *Executive Jet, Inc. v. City of Cleveland, Ohio*, supra and that such mandate cannot be ignored merely because the "Rules of the Road" might govern the litigants' conduct.

SUMMARY OF ARGUMENT

The Court of Appeal erred when it found that a collision between two non-commercial pleasure craft occurring on a non-commercial inland waterway supported the exercise of admiralty jurisdiction by the federal courts. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ctt. 493, 34 L.Ed.2d 454 disapproved of the "strict locality" rule of admiralty jurisdiction and requires in addition to location on navigable waters that the wrong have some reasonable connection with commerce and maritime navigation. Since this collision occurred on an inland waterway that is not used nor likely to be used for commercial maritime activities and since the vehicles and parties involved have no con-

nection with commercial maritime activities, then the collision is of only local significance and does not warrant the invocation of federal admiralty jurisdiction as a matter of federal-state comity.

ARGUMENT

The record fairly reflects and there is no dispute between the parties that this case involves a collision between two pleasure craft "in the purest sense of the word." (J.A. 21) As found by the District Court, immediately prior to the collision, Shirley Eliser was operating an 18 foot pleasure boat used exclusively for "pleasure boating" in a southerly direction on the Amite River approximately ½ to ¾ mile downstream from the French Settlement Bridge. (J.A. 19) The other boat was a 16 foot "bass boat" powered by an outboard motor which was heading in a northerly direction upstream. (J.A. 19) There is no real dispute that the bass boat made a left turn maneuver into the path of the southbound pleasure boat. (J.A. 19)

It is hotly contested between the heirs of Clyde Richardson and June Allen whether the decedent or Mrs. Allen was operating the bass boat at the time of the collision (J.A. 5 and 8); but for the purposes of the jurisdictional question presented, the identity of the operator is not relevant, since neither of these parties was engaged in any maritime commercial activity with the bass boat or any other boat.

The District Court has never decided to what extent the Amite River at the point of collision was subject to commercial activity or actually being used for such activities, although the Court of Appeals recognized ". . . from the record that the place where the accident occurred is seldom, if ever, used for commercial activity." (J.A. 36)

As found by the District Court these facts are undisputed:

"(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident, the boat was actually pulling a skier on a zip sled;

(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in a 'commercial maritime activity' before the accident;

(4) At the time of the accident neither boat was involved in any 'commercial maritime activity' of any sort;

(5) Neither of the two drivers of the boats were being paid to operate the boat, nor was this activity in any way a part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of 'traditional maritime activity', either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any 'commercial activity,' even in the broadest admiralty sense, had ever been previously engaged in by either of the boats in question, and in fact the two boats would have to be classified as 'purely pleasure craft', not in any way 'involved in commerce'; and,

(9) There is no other instrumentality involved in this accident that had even a minor relationship to 'admiralty' or 'commerce'; i.e. a buoy, barge, oil drilling apparatus, etc." (J.A. 20 and 21)

Given this factual background and especially in light of the location of the accident we submit the United States Court of Appeals for the Fifth Circuit erred, as a matter of law, in finding that federal courts do have admiralty subject matter jurisdiction over this claim.

The question presented is "whether the admiralty jurisdiction of the federal courts should be extended to accidents occurring between purely recreational boats in which there is absolutely no commercial or traditional maritime activity involved." We would answer the question in the negative.

There is now uniform agreement between the Courts and commenators that the admiralty jurisdiction of the federal courts emanated from the conviction of the members of the Constitutional Convention that there was a need for a uniform body of laws, in general harmony with the laws of other maritime nations, for the conduct of the commercial shipping trade. Regulation of the shipping industry was close to the conduct of foreign affairs, and those engaged in the industry were thought to have a need for predictability for their rights and liabilities. The Courts' admiralty jurisdiction was created to serve commercial shipping interests by providing a uniform body of law for the resolution of legal disputes arising among those engaged in that industry without being hampered by particular laws of local ports.[2]

There is no compelling need for a uniform body of laws to govern the use of small privately owned and operated water craft used entirely for pleasure boating and pleasure fishing. As pointed out by Professor Stoltz in his often quoted article

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2. For a discussion of the historical development of the role of admiralty jurisdiction, see: Chapter 1, Gilmore and Black, **The Law of Admiralty** (2nd Edition); Stoltz, **Pleasure Boating and Admiralty, Erie at Sea**, 51 Cal.L.Rev. 661; Calamari, **The Wake of Executive Jet—A Major Wave Or A Minor Ripple, IV, The Maritime Lawyer** 52 (1979).

> "Commerce and uniformity go together. There is virtue in having the same rules applied to ships and their cargoes moving from port to port: uniformity promotes the free movement of trade by increasing the confidence of merchants in their ability to conduct business successfully. That, and no more, seems to have been what the framers had in mind in granting civil admiralty jurisdiction to the federal courts. But where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events occurring locally that have only local impact." Supra, 51 Cal.L.Rev. at 671.

Indeed, when the Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870) defined "navigable waters of the United States" over which federal courts could exercise admiralty jurisdiction, it demonstrated an awareness of the basic connection between admiralty and commerce when it said:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade or travel on water. And they constitute navigable contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." 77 U.S. 557, 563.

The so-called "strict locality" test of maritime jurisdiction had its genesis in *The Plymouth*, 70 U.S. (3 Wall.) 20

(1865) when Mr. Justice Story, as the spokesman for the Court, pronounced in substance that every type of tort occurring upon navigable waters, whether or not on a vessel, would support federal admiralty jurisdiction. Although *The Plymouth* has been legislatively overruled somewhat by Congress when it first enacted The Extension of Admiralty Act, 46 U.S.C. §740 (1970), the decision did serve as the cornerstone of the development of admiralty jurisdiction. Although early commentators and Courts suggested a maritime nexus in addition to location might be required to support jurisdiction, such nexus never developed much weight. And over time, location became axiomatic with jurisdiction. Calamari, supra. IV *The Maritime Lawyer* 52.

The automatic application of "strict locality" by the Courts was easy, but it often lead to absurd results as recognized by this Court in *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). While the facts of that case involved an airplane crash, and the actual holding was so restricted, much of the opinion discussed this Court's dissatisfaction with the "strict locality" test as a basis for admiralty jurisdiction in all tort actions.

We take the position as most commentators and Courts[3] have that *Executive Jet* does require something more than a fortuitous event occurring on navigable waters to support jurisdiction in all "species of torts"; that additionally the events must have some rational basis to traditional concepts of maritime commerce or navigation.

Since this Court in *Executive Jet*, district and appellate courts have experienced considerable difficulty in deciding

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3. See Calamari, supra., IV The Maritime Lawyer 52 (1979), 2 E. Benedict, The Law of American Admiralty (7th Ed. 1975); Stoltz, supra., 51 Cal.L.Rev. 661 (1963).

the jurisdictional bases in claims arising out of pleasure boating collisions and inconsistent decisions resulted. The Fourth Circuit in *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973), clearly approved of Professor Stoltz's conclusion that admiralty jurisdiction should not be exercised over claims arising from pleasure boating accidents. That case, however, dealt with a claim by an injured water skier against the operator of the tow boat for injuries arising out of the operator's alleged operation of the vessel. The Court was able to base its findings of no admiralty jurisdiction, however, on this Court's specific disapproval of *King v. Testerman*, 214 F.Supp. 335 (E.D. Tenn., 1963) in *Executive Jet*.

In a later decision by the same Court, *Richards v. Blake Builders Supply, Inc.*, 528 F.2d 745 (4th Cir. 1975), the Court again expressed apparent belief that local pleasure boating claims should not be subject to admiralty jurisdiction, but the Court was obviously reluctant to so hold in light of its uncertainty as to the application of *Executive Jet* to pleasure boating claims.

In *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), the Fifth Circuit set forth contain factors to be considered in determining whether admiralty jurisdiction should apply to a particular case. The Court reasoned at page 525:

> "From the facts and analysis of *Executive Jet* and *Peytavin*, we can discern factors to be considered in the circumstances before us: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and the traditional concepts of the role of admiralty law."

Kelly v. Smith, supra, involved a cause wherein rifle fire was directed from an island in the Mississippi River at a small

pleasure boat that was fleeing the island after its occupants had poached deer. The Court found in that case that it could hear that case under its admiralty jurisdiction stating at page 526:

> "Rifle fire directed at a vessel, albeit a small one, on a major commercial artery, and injuring the pilot, presents sufficient danger to maritime commerce for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct. Regardless of whether the Kellys had available remedies in state courts, the federal interest in protecting navigation on the Mississippi River overrides any consideration of federal-state comity or conflicts of interest."

In *Kelly*, the Court recognized that the complained of conduct presented a clear danger to maritime commerce because it affected navigation on a "major commercial activity." Judge Morgan wrote a strong dissent in *Kelly*. He would have found no jurisdiction because the case presented a matter of strictly local concern as a matter of state comity and would have deferred to the strong interest the State of Mississippi had over the conduct of the litigants.

Kelly, in our mind, factually approaches the extreme view that a Federal Court should take in defining jurisdiction. We are not highly critical of the decision because it does recognize implicity that the conduct have some relationship to commerce. Note that the Court gave great weight to the fact that the occurrence took place on the Mississippi River, no doubt a very major commercial artery.

The District Court also analyzed *Kelly*:

> "Most importantly to this case, the discussion in the *Kelly* case indicated that there was either some 'commercial activity or some traditional maritime connec-

> tion' present to invoke admiralty jurisdiction. It seems clear from the facts in *Kelly* that the case dealt, at least to some degree, with what this court might term 'piracy' in that the plaintiffs were admittedly poaching on the land which the defendant, J. C. Smith, had been hired to protect." (J.A. 26)

The Fifth Circuit was strongly influenced by *Kelly*, but did not read the decision to require any connection whatsoever between the occurrence and commerce. The Court states at J.A. 36:

> "Our decision in this case is strongly influenced by the holding in *Kelly v. Smith*, supra, in which this Court stated that '(a)dmiralty has traditionally been concerned with furnishing remedies for those injured while travelling navigable waters."

Surely, the Fifth Circuit cannot mean that simply because some federal courts have in the past recognized admiralty jurisdiction over accidents involving pleasure craft, that it is bound to do so in the present action. If this is the case, then this Court's pronouncement in *Executive Jet* is meaningless to litigation other than aviation cases. We simply do not believe this Court meant for the ruling to stop there.

Where we do take issue with the Fifth Circuit is in the abandonment of any commercial connection to the occurrence or location. The Court discussed various problems which it felt would be exacerbated by requiring commercial flavor to the conduct. It went on to state at J.A. 36:

> "Only a uniform admiralty law, extending to non-commercial as well as commercial navigation, avoids these problems."

The Court went on to discuss to location of the wrong:

> "We note additionally from the record that the place

> where the accident occurred is seldom, if ever, used for commercial activity. That does not cause us to vary from our holding. The waterway is not landlocked. It would be introducing another note of uncertainty to hold that admiralty jurisdiction extends only to a stretch of navigable water that presently functions as a commercial artery." (J.A. 36 and 37)

We would submit that by abandoning the requirement of some connection between the place, wrong and commerce, the Lower Court is in effect attempting to retreat to the pre-*Executive Jet* "strict locality" test. We believe this to be in violation of this Court's mandate as well as the opinion of at least other panels within the Fifth Circuit itself.

In the recent case of *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981), the plaintiff filed suit for property damages arising out of a blowout of its high pressure gas well which occurred while defendant was performing workover operations from its submersible drilling platform, which, at the time, was resting on the bottom of a dead-end canal slip in Louisiana. The Fifth Circuit found that the District Court had improperly assumed jurisdiction and held that for an action to lie under the Admiralty Extension Act, the injury complained of must bear a significant relationship to maritime activity. The Court stated at page 1136:

> "The (Admiralty Extension Act) was not intended to grant claimants new substantive rights of recovery nor relieve them from jurisdictional constraints unrelated to locality—a la Executive Jet—imposed on general maritime tort claimants. Accordingly, we find claims under the Admiralty Extension Act to be subject to the 'maritime relationship' rule of *Executive Jet*."

We submit that the "maritime relationship" is something more than the mere fact that the occurrence happened on navigable water and it is evident that even within the Fifth Circuit this argument prevails.

Our appreciation of the jurisprudential pattern, including *Kelly v. Smith*, supra, and federal/state comity viewed in the light of the need for uniform laws only as they relate to commerce or shipping dictates a balancing of location with commercial nexus. As location becomes less relevant to maritime commerce, the activity complained of must have a closer relationship to commerce - (commercial) conduct + (commercial) location = admiralty jurisdiction. If we examine *Kelly v. Smith*, supra, we find that the strong reliance the Court placed upon the location of the wrong, the Mississippi River, and the concomitant danger to navigation even a small boat presents on that waterbody to maritime commerce, justified a conclusion of admiralty jurisdiction. Application of the formula to the case at bench would not support jurisdiction because the operation of the boats had no relationship to commerce in even the slightest degree and the location of the occurrence was essentially commercially insignificant. Surely in this action, federal jurisdiction interest created and expanded to regulate the shipping industry should give way to Louisiana's right to regulate purely pleasure boating occurrences on an insignificant inland waterway.

The District Court Judge recognized this notion when he stated at J.A. 26:

> "When the location of the injury is on or in a navigable waterway, the requirement of a 'traditional maritime connection' becomes less stringent. In *Kelly v. Smith*, supra, the poaching or piracy, with its commensurate miniwar between the parties in a stretch of the Mississippi River, which is conclusively navi-

gable, was enough to trigger the admiralty jurisdiction of the federal court. However, in the case at bar this court can find no 'traditional maritime connection' between the injuries received and the location of the tort. Admiralty jurisdiction was created to serve the commercial shipping industry's interests by providing a stable and constant body of law which is to be used in the resolution of litigation arising between those people actually engaged in it. The tremendous increase in the number of small pleasure boats, whether for skiing or pleasure fishing, is a contemporary problem. When the owners of these watercrafts have absolutely no commercial or traditional maritime interests which require the protection of the admiralty side of the federal judiciary, then admiralty jurisdiction should be withheld. In this context Professor Stoltz feels that the operation of small pleasure craft is so 'local' in nature that a uniform body of law is a detriment and that instead, the jurisdiction of these cases should be transferred to the states."

This is also the view taken by Benedict when he states:

"In the Executive Jet Aviation, Inc. v. City of Cleveland, the Supreme Court, while affirming that the traditional view of the court was that maritime tort jurisdiction was governed by locality, did not in fact advert to the historical reason underlying the rule.

The final decision is, it is submitted, valid in the light of the considerations pointed out above. It is only in the primary locale of admiralty, that is, on the high seas, that jurisdiction in tort is not dependent on any relationship with commerce and navigation. In the secondary locale, namely inland navigable waters, admiralty jurisdiction is attracted in cases of tort only when such tort has a significant relationship to shipping and navigation." Benedict, I *Benedict on Admiralty*, 9-5 (7th Ed. 1980)

The Court of Appeal felt that admiralty jurisdiction should be invoked merely because the federal "Rules of the Road" would be used as a test of negligence. There is no impediment to the application of those rules by the state courts. In fact, state courts are not only allowed, but are mandated, to enforce federal statutes relating to navigation and are to give those rules the same construction as they are given by federal courts sitting in admiralty. *Carlin v. New York N.H. & H.R. Co.*, 1911, 130 N.Y.S. 828; *Chesley v. Nantasket Beach Steamboat Co.*, 1901, 61 N.E. 50, 179 Mass. 469, 33 U.S.C.A. 154.

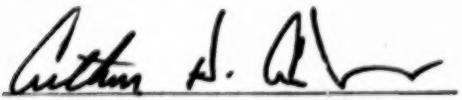
The lower court majority recognized that the record in this case indicated that the Amite River was seldom, if ever, used for commercial activity. (J.A. 36) As pointed out in *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975), admiralty jurisdiction does not extend to a tort claim arising in waters "traversed" by small pleasure craft only, "where no commercial shipping occurred or was likely to occur." Accord: *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978) and *Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980).

CONCLUSION

The Fifth Circuit Court of Appeals erred in finding that the facts of this case supported the exercise of admiralty jurisdiction. A collision between two pleasure craft, whose exclusive use is and has been recreational, on a small inland river which, though navigable in the strictest sense, is not used for nor likely to be used for commercial maritime activities is of such a local nature that federal courts do not have admiralty jurisdiction to hear tort claims arising out of such collision. Petitioners are entitled to a judgment reversing the judgment of the Court of Appeals entered April 2, 1981 and entering judgment in favor of Shirley Eliser and Foremost

Insurance Company and against Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson dismissing their complaint for want of subject matter jurisdiction.

Respectfully submitted,



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JURISDICTIONAL APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

U.S. Constitution, Article III.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, or public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place of Places as the Congress may by Law have directed.

II.

28 U.S.C. §1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

III.

28 U.S.C. §1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all

proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, §79, 63 Stat. 101.

IV.

33 U.S.C. §154. Adoption of rules for navigation of harbors, rivers and inland waters.

The following regulations for preventing collisions shall be followed by all vessels upon the harbors, rivers, and other inland waters of the United States except the Great Lakes and their connecting and tributary waters as far east as Montreal, and the waters of the Mississippi River between its source and the Huey P. Long Bridge and all of its tributaries emptying thereinto and their tributaries, and that part of the Atchafalaya River above its junction with the Plaquemine-Morgan City alternate waterway, and the Red River of the North, and are declared special rules duly made by local authority. June 7, 1897, c. 4, §1, 30 Stat. 96; May 21, 1948, C 328, §1, 62 Stat. 249; Aug. 8, 1953, c. 386, §1, 67 Stat. 497.

§ 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury

done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusion remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

§ 658. Payment of claims, policies other than life and health and accident; penalties

All insurers issuing any type of contract other than those specified in R.S. 22:656 and 22:657 shall pay the amount of any claim due any insured including any employee under Chapter 10 of Title 23 of the Revised Statutes of 1950 within sixty days after receipt of satisfactory proofs of loss from the insured, employee or any party in interest. Failure to make such payment within sixty days after receipt of such proofs and demand therefor, when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of 12% damages on the total amount of the loss, payable to the insured, or to any of said employees, together with all reasonable attorney's fees for the prosecution and collection of such loss, or in the event a partial payment or tender has been made, 12% of the difference between the amount paid or tendered and the amount found to be due and all reasonable attorney's fees for the prosecution and collection of such amount. Provided, that all losses on policies covering automobiles, trucks, motor propelled vehicles and other property against fire and theft, the amount of the penalty in each of the above cases shall be 25% and all reasonable attorney's fees.

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of Petitioners have been served on the Honorable Dorsey Martin, III, Maughan, Atkinson & Martin, Ltd., 1755 Wooddale Boulevard, Baton Rouge, Louisiana 70806, counsel of record for respondents, Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson, and on the Honorable Victor L. Marcello, Talbot, Sotile, Carmouche, Marchand & Marcello, Post Office Drawer 669, Donaldsonville, Louisiana 70346, counsel of record for June G. Allen by depositing said copies in the U.S. mail, postage prepaid, this 16 day of November, 1981.

I further certify that all parties required to be served have been served.

Arthur A. Andrews

ARTHUR HOWELL ANDREWS